Case No. B_____

IMMEDIATE STAY REQUESTED
(Order Mandates Production Of Privileged Information By 10/21/2019)

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION: p

LOS ANGELES PROPERTY OWNERS ASSOCIATION

Respondent and Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent.

ADRIAN RISKIN
Petitioner and Real Party in Interest

Petition For Writ of Mandate, Prohibition Or Other Extraordinary Relief

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Los Angeles County Superior Court Case No. BS174792
Honorable Mitchell L. Beckloff

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LOS ANGELES PROPERTY OWNERS ASSOCIATION

Certificate of Interested Parties

(Los Angeles Property Owners Association)

☒ Los Angeles Property Owners Association is a nonprofit association consisting of thousands of property owners in Los Angeles, none of which have a financial interest greater than 4 %. Therefore, there are no interested entities or parties to list in this Certificate pursuant to California Rules of Court, rule 8.208, subd. (d)(3)

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	

DATED: September 16, 2018 Bradley & Gmelich LLP

By: _____

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INTRODUCTION

The California Public Records Act, Government Code, sections 6250, et seq. ("CPRA"), establishes methods by which citizens can obtain disclosure of public records. But the right to obtain access to public records is not absolute. Privileges protect the disclosure of public records.

This case involves an issue of great, wide-spread importance to the judiciary, the bar, and California's public agencies regarding the proper application of the "deliberative process privilege" and its scope to public records, particularly where the substance of email strings contains the predecisional mental thoughts, judgments, methodology, deliberations and similar materials related to policy decisions inextricably intertwined with other matters, making the erroneous disclosure harmful to the decision making process.

Here, Real Party in Interest, Adrian Riskin ("Riskin") sent at least 37 CPRA record requests over a period of time to Petitioner Los Angeles Property Owners Association, also referred to as the Fashion District Business Improvement District ("LA Fashion BID"). Riskin's July 7, 2017 Request No. 2 sought "all emails" between LA Fashion BID and Urban Place Consulting Group Inc. ("UPC") – a consulting group assisting with BID's renewal and the special property assessments involved in the renewal process. LA Fashion BID withheld two email strings responsive to Request No. 2 and Respondent Court found those emails to be privileged under the deliberative process

privilege.[1] The Court reaffirmed the BID's right to withhold more than the majority of the two email chains based on the deliberative process privilege exemption.

However, the Court concluded that notwithstanding the proper invocation of the deliberative process privilege, the BID was required to essentially produce the emails with the substance redacted—in one instance, the entire substance of the email was ordered redacted except the salutation and the closing – a pointless, meaningless, and time-consuming process. In another instance, the entire email was ordered redacted except for a single interrelated sentence – a question – in the middle of the email laden with protected information. The reasons for disclosure of snippets of "inextricably intertwined" protected information, much less guidance to avoid repeating this costly[2] decision to withhold privileged information, is absent from Respondent Court's decision.

Respondent Court's Order erred in several respects:

- Respondent Court went word by word, sentence by sentence, and ordered LA Fashion BID to produce the protected emails in a redacted form, splitting sentences in two and disclosing sentences out of context – which is not only cumbersome and contrary to the law prohibiting

[1] Respondent Court directed those emails to be provided for review in camera and LA Fashion BID submitted them to Respondent Court as Exhibit 10. (2 Exh. 7:588.) That Exhibit, containing those email strings, is being provided to this Court under seal, concurrently with this Petition.

[2] Real Party's counsel has a Motion for Attorneys' Fees pending seeking approximately $187,000 for the redacted emails Respondent Court ordered produced.

disclosure of matters "inextricably intertwined" with the substance of the deliberative process communication but is also erroneous because it still results in disclosure of privileged information;

- Ordered the redacted disclosure of the emails without engaging in the required balancing process weighing the public interest in nondisclosure versus the public interest in disclosure, particularly where no evidence existed to support Riskin's stated interest in public disclosure, and there was overwhelming evidence produced as to the public benefit in non-disclosure;
- Ordered LA Fashion BID to undertake another search for documents in response to Request No. 2, despite uncontradicted evidence that LA Fashion BID performed a "reasonable search" because: (1) a previous Riskin CPRA search resulted in the production of Executive Rena Leddy's emails; (2) the search in response to Request No. 2 consisted of inquiry of the only other BID person engaged in communications with the UPC and those emails were the subject of the deliberative process privilege; (3) No substantial evidence demonstrated that others communicated with UPC.

A writ should issue here because there is a dearth of California judicial authority addressing the concept – recognized under federal law – that no public record disclosure of deliberative process privileged documents should occur where the content of unprotected material is "inextricably interwoven" with

the communication process by which policies within an agency are formulated (i.e. protected material). Public agencies, and the attorneys who advise them, need practical guidance to determine the rhyme or reason, if any exists, in the division of sentences, paragraphs and context of emails. What purpose is served in obtaining public records where the disclosure ordered by a court consists of a mere salutation and closing?

Without writ relief, there is no practical remedy for LA Fashion BID to address the Respondent Court's erroneous rulings and to prevent the disclosure of information protected by the deliberative process privilege or to prevent an erroneous impracticable further search for records that do not exist. Respondent Court's erroneous order puts LA Fashion BID in the position of navigating the Scylla and Charybdis of complying with an erroneous order and suffering the consequences, or defying the erroneous order and suffering the consequences.

Appellate review is warranted.

WHY WRIT RELIEF IS NECESSARY

Code of Civil Procedure, sections 1085 and 1086, provide for the issuance of a writ of mandate or prohibition "to compel the performance of an act which the law specifically enjoins . . . in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. . . ." Writ review is both necessary and appropriate in this instance. (Code Civ. Proc. §§ 1085, subd. (a) and 1086.)

This case involves the CPRA, which was modeled on the federal Freedom of Information Act, 5 U.S.C. § 552, et seq.) In

order to challenge any trial court order erroneously directing disclosure of public records under the CPRA, Government Code, section 6259, eliminated the right to appeal and mandated, instead, the use of a petition for writ of mandate as the only method for a party to seek appellate review. (Gov. Code, § 6259, subd. (c).) By statute, section 6259 provides an expedited appellate procedure for immediate review. (*BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 6, 1336 [*Times Mirror*].) On that basis alone, writ review is mandated.

Furthermore, writ review is also appropriate under the regularly-considered discretionary standards best articulated in *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274.). Here, LA Fashion BID's Petition meets the criteria because, as stated above, by statute, no adequate remedy at law exists. (Gov. Code, § 6259, subd. (c).) Also, irreparable harm will result because the deliberative process privilege applies to documents responsive to Riskin's Request No. 2 and once privileged matters have been disclosed, there is no way to undo the harm. (See, *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071 [attorney-client privilege].)

Under the deliberative process privilege, the executive and legislative branches of government may withhold public records because policy decisions can only be effective where the decision makers are allowed to engage in frank and candid discussions during the formulation stage of policies and are not subjected to public scrutiny regarding matters ultimately rejected once

policies are established. Thus, the deliberative process privilege protects a public agency's documents that contain the mental thoughts, exchange of ideas, expressions of methodology used and the processes involved in the pre-determination stage of policy formation and all matters "inextricably intertwined" with those protected communications. (See, Gov. Code, § 6239, subd. (a) and 6255.) To hold otherwise would chill the flow of candid information.

In this case, the Fashion District BID sought protection for two email strings exchanged between the BID's Finance Manager and its consultant, Urban Place Consulting, involving the special assessment methodology utilized by the Executive Director to make recommendations for the renewal of the BID and the property assessments made against the association members. It was the responsibility of BID's Executive Director Rena Leddy, working with the Finance Manager, to make recommendations to the Board in conjunction with UPC. Ultimately, the BID adopted Leddy's recommendations for those special assessments at its August 3, 2017 Board meeting and those polices were written and contained in the BID Management Plan. However, during the pre-decision phase, emails were exchanged with UPC that contained mental thoughts and ideas, discussed the methodology used, and identified documents examined involved in the process of determining the special assessments.

Respondent Court determined that the subject emails were protected by the deliberative process privilege yet ordered production of redacted emails and ordered an additional search

for records responsive to Request No. 2. Writ review is necessary because Respondent Court's order is erroneous in several respects.

First, the Order compels disclosure of documents admittedly protected under the deliberative process privilege. A petition for extraordinary relief is not only the exclusive remedy allowed to address and examine such improper orders issued pursuant to the CPRA, writ review is also a warranted method for appellate review where a trial court's order improperly runs the risk of infringing a privilege. (See, *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1012 [citing *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336].) Mandate is the only remedy available to prevent an unjust Hobson's choice: disclose privileged information or face contempt for violating a court order. (*Roberts v. Superior Court, supra*, 9 Cal. 3d at p. 336.)

Second, in responding to any request for public records, the scope of the search conducted by an agency need only be reasonably calculated to locate responsive documents. Here, the uncontradicted evidence established that LA Fashion BID searched the computers of the two individuals employed with the BID who communicated with Urban Place Consulting. The uncontroverted evidence showed no Board Member communicated with BID. No evidence suggested any other BID employees communicated with UPC. Respondent Court's order directing LA Fashion BID to perform an additional search is not supported by substantial evidence and constitutes an abuse of discretion. Alternatively, Respondent Court abused its discretion

in excluding further evidence offered to establish that LA Fashion BID's search was reasonable because only two BID employees communicated with UPC.

Third, the uncontroverted evidence established that many of the real property owners who pay the special assessments are not pleased with the amount assessed against them and disclosure of the predecisional communications regarding those special assessments would have an adverse effect on the renewal of LA Fashion BID, weighing against disclosure. The uncontroverted evidence also established that the need for public disclosure was not the subject of the emails – Riskin's claim that LA Fashion BID engages in participation in illegal lobbying regarding homelessness. In other words, the only reasonable conclusion was that the weight tipped heavily against disclosure.

Without writ relief to intercede, compliance with Respondent Court's erroneous order rings a bell that cannot be "unrung." As to Request No. 2, Respondent Court found that the deliberative process privilege applied to protect portions of those emails produced in camera – (i.e., BID complied with its obligations to withhold documents under the CPRA). Yet, Respondent Court went line-by-line, word-by-word, parsing out paragraphs, sentences, and words and requiring disclosure of portions of the subject emails, including disclosure of protected information. The erroneous nature of Respondent Court's determination is exemplified by the order directing that 6 words out of a 20-word sentence be withheld (redacted) as privileged while the remaining 14 words are ordered disclosed.

In doing so, Respondent Court erroneously failed to recognize that an agency's has no obligation to produce any privileged information, particularly where the nonexempt materials are "inextricably intertwined" with exempt materials. Nothing could be more "inextricably intertwined" than emails whose predominate subject is the deliberative process, particularly 20 words intertwined with one another in a single sentence.

As a consequence, Respondent Court improperly mandated the disclosure of information revealing the deliberative process undertaken by the Los Angeles Fashion District BID while working with a consultant, UPS, regarding the BID renewal process.

This case presents issues of major importance to the judiciary, the legal profession, and California's public agencies because few California judicial decisions mention the term "inextricably intertwined" in the context of a CPRA request, let alone analyze that term in the context of emails indisputably protected by the deliberative process privilege. Furthermore, there is a dearth of authority regarding the "reasonableness" of the scope of a search under the CPRA.

Writ relief is warranted and proper.

A stay is requested because Respondent Court ordered production of the protected information within 60 days from the Notice of Entry of the Writ – October 21, 2019.

PETITION FOR WRIT OF PROHIBITION, MANDATE OR OTHER APPROPRIATE RELIEF

Petitioner Los Angeles Property Owners Association, which is an association also known as LA Fashion District Business Improvement District ("LA Fashion BID"), petitions this Court for a peremptory writ of mandate, prohibition or other appropriate relief directed to Respondent Court for the State of California, for the County of Los Angeles, and by this verified Petition alleges:

1. Beneficial Interest Of Petitioner, Capacities Of Respondent And Real Parties In Interest

1. Petitioner LA FASHION BID is the Defendant and Respondent in an action brought under the California Public Records Act (CPRA), Government Code, sections 6250 et seq., entitled *Adrian Riskin v. Downtown Los Angeles Property Owners Association, etc.*, Los Angeles County Superior Court Case No. BS174792, currently pending in respondent court. Respondent court's August 15, 2019 Judgment denied the Petition for public records in virtually every respect. However, Defendant and Respondent LA Fashion BID is the entity affected by that portion of respondent court's August 15, 2019 Judgment directing LA Fashion BID to produce documents subject to the privilege known as the deliberative process privilege and ordering LA Fashion BID to conduct and undertake a search for documents. Plaintiff Adrian Riskin ("Riskin") is the plaintiff and petitioner in Case No. BS174792 currently pending in Respondent Court and is named here as the Real Party in Interest.

2. Authenticity Of Exhibits

2. Exhibits 1 through 27 and Exhibit 29 are true and correct copies of documents on file in Respondent Court. Exhibit 28 is a true and correct copy of the Reporter's Transcript of the hearing in Department 86 conducted on June 26, 2019. Exhibit 29 is a true and correct copy of Respondent Court's August 15, 2019 Judgment Granting In Part Petition For Writ of Mandate. The exhibits are incorporated herein by reference as though fully set forth in this Petition.

3. Timeliness Of Petition

3. On August 15, 2019, respondent court entered a Judgment granting in part and denying in part Riskin's Petition for Writ of Mandate. Pursuant to Government Code, section 6259, the order is not a final judgment or order from which an appeal may be taken. However, the judgment "shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (Gov. Code, § 6259.) The Notice of Entry of Judgment was served by mail on August 20, 2019. Therefore, this Petition is timely because it is filed within 25 days after service by mail of the written notice of entry of the judgment.

4. Chronology of Pertinent Events

4. On August 15, 2018, Petitioner and Real Party in Interest Adrian Riskin filed his verified Petition for Writ of Mandate under the California Public Records Act. (1 Exh. 1:90) Riskin alleged he is an open records activist and publicizes his findings through blogs and events. (1 Exh. 1:92.) Riskin alleged

that LA Fashion BID had a "role in frustrating Skid Row residents' 2017 effort to establish their own neighborhood council. (1 Exh. 1, ¶ 2.) Therefore, on May 17, 2017, July 7, 2017 and July 31, 2017, Riskin's made Requests for public records information, which were alleged to have been unlawfully withheld. (1 Exh. 1:93.)

A. The general allegations identified the May 17, 2017 Request No. 1 as seeking: (a) communications between LA Fashion BID and South Park BID from January 1, 2016 through May 15, 2017 and (b) all 2017 emails of the Chairman of the BID Board, Mark Chatoff relating to the operation of BID. (1 Exh. 1:93, 108.) The complaint alleged LA Fashion BID's response was untimely and it withheld records that were known to exist without clarification of the basis for withholding those records. (1 Exh. 1:93-94; 116-121; 123-125, 127, 129-133.)

B. The allegations also identified the July 7, 2017 Request No. 2 as seeking emails between LA Fashion BID and Urban Place Consulting. (1 Exh. 1:94-96; 135.) Urban Place was identified as a consulting firm specializing in providing services for LA Fashion BID's renewal, which requires City Council ordinances. (1 Exh. 1:95; 137.) LA Fashion BID responded and withheld documents based on the deliberative process privilege. (1 Exh. 1:95-96; 139; 141-143, 145.)

C. The general allegations also identified the July 31, 2017 Request No. 3, which sought all 2017 emails of Board Member Linda Becker relating to the operation of LA Fashion BID. (1 Exh. 1:96; 149.) LA Fashion BID responded that no

responsive records existed. (1 Exh. 1:96; 152.) When challenged by Risken, LA Fashion BID asserted the documents were exempt from disclosure pursuant to the deliberative process privilege. (1 Exh. 1:96; 154-159.) Riskin continued to demand that LA Fashion BID not delete records and that the BID conduct a search for records. (1 Exh. 1:96-97.)

D. Riskin's First Cause of Action was for violation of the CPRA. (1 Exh. 1:97-103.) The First Cause of Action contains multiple paragraphs arguing the various aspects of the burdens on the responding agency to justify its nondisclosure of documents. (1 Exh. 1:98 [¶37].) Riskin also argued various aspects of the deliberative process privilege. (1 Exh. 1:99-100.) Riskin alleged LA Fashion BID unlawfully withheld records in Request No. 1 because the records involved third parties and public interest was too great for disclosure. (1 Exh. 1:100-101.) Further, the failure to possess Chatoff emails was claimed to be wrongful because it "defies belief." (1 Exh. 1:102.)

E. Riskin also alleged LA Fashion BID unlawfully withheld records in Request No. 2 also because it was "extremely unlikely" that the deliberative process privilege applied to all emails between LA Fashion BID and UPC and and public interest was so great in favor of disclosure. (1 Exh. 1:100-101.)

F. Riskin also alleged LA Fashion BID unlawfully withheld records in response to Request No. 3 – the Becker emails. Riskin alleged that the absence of records "defies belief" and also "incredibly unlikely" that the deliberate process privilege applied. (1 Exh. 1:102-103.)

G. Riskin prayed for a declaration of LA Fashion BID's violation of the CPRA, a preemptory writ directing the BID to locate and provide the requested records, and an award of attorneys' fees. (1 Exh. 1:104.)

5. Respondent LA Fashion BID filed its verified Answer to the Petition on September 20, 2018. (1 Exh. 2.)

6. On or about April 25, 2019, Riskin filed and served his Motion for Writ of Mandate, supported by a Memorandum of Points and Authorities. (1 Exh. 3 and 4.) The Motion was also supported by the Declarations of Abenicio Cisneros and Adrian Riskin. (1 Exh. 5 and 6.)

A. Riskin testified that he submitted Request Nos. 1, 2 and 3 and identified the links containing LA Fashion BID's responsive documents. (1 Exh. 6:297.) As to Request No. 2, Riskin stated that he performed other public records requests to other Business Improvement Districts and obtained responsive documents that LA Fashion BID did not produce. (1 Exh. 6:298.) Several of those emails were attached. (1 Exh. 6:302-309 and 311-312.) Riskin also identified a Board Agenda showing that Urban Place met with the Renewal Committed twice a month. (1 Exh. 6:300; 314.)

B. Abenicio Cisneros declared that he is the attorney for Riskin. (1 Exh. 5:196.) He compiled articles purporting to establish the "activities" of Business Improvement Districts generally who seek to exclude the homeless from public space. (1 Exh. 5:196-197; 201, 254.) He also included articles specifically related to LA Fashion BID and its "political advocacy

and municipal lobbying." (1 Exh. 5:196-197.) Cisneros declared that the articles discuss the efforts of BIDs to oppose the formation of the Skid Row Neighborhood Council. (1 Exh. 5:197; 263-265.) Riskin also provided the Financial Statements of LA Fashion BID reflecting the revenue generated "from assessments to parcels of real property." (1 Exh. 5:198; 271-285.) Cisneros also attached information from LA Fashion BID's website showing that it performs cleaning, safety, marketing and advocacy programs. (1 Exh. 5:198: 287-291.) Cisneros also provided a LA Fashion BID Board Members roster from 2016, with email information. (1 Exh. 5:198; 295-296.)

C. Riskin argued that LA Fashion BID repeatedly violated the procedural requirements of the CPRA. (1 Exh. 4:185-186.) In addition, LA Fashion BID indicated that it was invoking the deliberative process privilege but failed to indicate whether records were being withheld. (1 Exh. 4:186.) Riskin demanded that declaratory relief was warranted. (1 Exh. 4:186.)

D. Further, Riskin argued that LA Fashion BID unlawfully withheld records in response to Request Nos. 1-3. (1 Exh. 4.) He argued that public policy favors disclosure of records and judicial enforcement of the CPRA, with the payment of attorneys' fees where the agency unlawfully denied access to records. (1 Exh. 4:187-188.) Riskin argued that Board Member emails were responsive to the requests whether located in a BID-controlled email or a private email, citing Government Code, section 6253, subdivision (c). (1 Exh. 4:188-190.)

E. Riskin argued LA Fashion BID violated the CPRA by failing to produce a single BID Board Member email and by claiming that the private accounts were outside the reach of the CPRA. (1 Exh. 4:191.) Riskin argued that LA Fashion BID unlawfully denied access to emails because Riskin already has responsive, non-exempt emails produced by others that were not included in BID's response. (1 Exh. 4:192.) Further, Riskin claimed the likelihood that UPC communicated with LA Fashion BID staff meant the failure to produce records was due to "an inadequate search or by overclaiming [sic] the deliberative process privilege." (1 Exh. 4:193.)

F. Riskin argued the records should be inspected in camera prior to finding they were properly withheld. (1 Exh. 4:193-195.)

7. Respondent LA Fashion BID opposed Riskin's Motion for Writ of Mandate with the submission of Declarations, Exhibits, and exemplar emails. (2 Exh. 7 and 3 Exh. 9.) LA Fashion BID also objected to the Petitioner's Declarations and Exhibits. (2 Exh. 8.)

A. Multiple Declarations contained the testimony of LA Fashion BID Board members regarding their computers and emails. (2 Exh. 7:321, 327, 329, 332, 334, 339, 354, 356, 358, 360, 362, 364, 366.) Those Declarations uniformly provided testimony that the declarant Board Member was a volunteer on the LA Fashion BID Board, not an employee and received no remuneration. (Ibid.) Those Board Members had no access to a LA Fashion BID computer and utilized their own private

computer when sending or receiving emails. Further, LA Fashion BID had no access to the private email of the individual Board Members. (2 Exh. 7:321, 327, 329, 332, 334, 339, 354, 356, 358, 360, 362, 364, 366.) With regard to Request No. 2, each Board Member testified that as of May 17, 2017, they had no documents or emails within their personal computers that were responsive. (*Ibid.* [¶ 6].) Also, the declarant Board Members did not delete or destroy any emails or documents in response to any CPRA request or in response to the fact that Riskin made a CPRA records. (2 Exh. 7:322, 327, 329, 332, 334, 339, 354, 356, 358, 360, 362, 364, 366.) LA Fashion BID's Executive Director confirmed that BID has no ownership, control or right to possession of the Board Members' private emails. (2 Exh. 7:351-352; 545; 546-568.)

B. The Declaration of Becker further identified a single email provided to respondent court for *in camera* inspection that was related to but not responsive to Riskin's Request No. 3. (2 Exh. 7:321-322.) Ms. Becker declared that she considered the email to be personal, from a friend, containing private health information and stated that it was unrelated to LA Fashion BID business. (2 Exh. 7:322.)

C. The Declaration of Mark Chatoff provided testimony that he was a volunteer member of the LA Fashion BID Board and was serving as its Chairman. He, too, had no access to a LA Fashion BID computer. When he sends or receives emails, he does so on his private computer. LA Fashion BID has no access to Mr. Chatoff's private email. (2 Exh. 7:323.) Chatoff

testified he had no emails responsive to Riskin's Request No. 2. Mr. Chatoff testified regarding the email identified by Riskin as one from Estella Lopez regarding the Skid Row Neighborhood Council. (2 Exh. 7:324.) He testified that the Lopez email was not a subject of LA Fashion BID business and was sent to him because of his personal interest in the subject as a real property owner. (2 Exh. 7:324.) Mr. Chatoff testified that he no longer had that email. Further, Mr. Chatoff did not delete emails because of any CPRA request or because Riskin requested emails. (2 Exh. 7:324.)

D. Ivan Fernandez supplied a Declaration as the principal of SPN Networks, Inc., providing IT services to BID. He testified to the existence of six (6) desktop computers at the Administrative Office and three (3) computers at the Field Office. (2 Exh. 7:325.) He testified that all computers had to be searched individually because there was no centralized email management. (2 Exh. 7:325.) Because too many emails increase Outlook speed and decrease costs of storage, BID exercised its option in 2015 to delete unnecessary emails.

E. Jose Gonzalez testified he was the Finance Manager for LA Fashion BID. He testified that one of his job responsibilities was to assist the Executive Director, Leddy, in preparing LA Fashion BID's budgets and that beginning in 2017 he assisted with LA Fashion BID's renewal process. (2 Exh. 7:326.) Consequently, Mr. Gonzalez was one of the persons responsible for communicating with the renewal consultant, Urban Place Consulting Group Inc. by telephone and email. At

Leddy's request, Gonzalez searched his computer for emails to or from Urban Place Consulting and informed Leddy that he considered those emails to be protected by the deliberative process privilege. (2 Exh. 7:326.) Gonzalez expressly testified that "Urban Place Consulting Group Inc. and I were assisting Ms. Leddy in evaluating various special assessment methodologies for the renewal of the BID contract with the City of Los Angeles." No other persons employed by LA Fashion BID were identified by Gonzalez as persons assisting Leddy in the renewal process. According to Gonzalez's testimony, the final special assessment methodology utilized for the renewal of the BID contract was described and explained in the Management Plan. (2 Exh. 7:326; 427-434.) He further testified that the emails had nothing to do with illegal lobbying.

F. Michael Kunkel provided testimony as an expert witness. (2 Exh. 7:336-338.) Mr. Kunkel was the Director of Investigative Services of Setec Security Technologies, Inc., providing litigation support for attorneys in the field of electronic information. Mr. Kunkel testified that two levels of metadata are imbedded in every electronic device and can be used to compromise the device on which the email is created (i.e., it can be hacked). (2 Exh. 7:337; 589-590.) Using email exemplars, Mr. Kunkel explained the security and privacy issues and he demonstrated the manner in which emails can be altered and that the metadata remains the same despite the altered email. (2 Exh. 7:337-338; 596-609.)

G. BID's evidence also included the Declaration of Rena Leddy. Leddy was the Executive Director of the BID. She worked on behalf of public entities for 26 years and was involved in creating or renewing BIDs on behalf of those agencies and entities. (2 Exh. 7:341.) The LA Fashion BID is a nonprofit corporation under contract with the City of Los Angeles and has been renewed from 1999 through 2027. (2 Exh. 7:341-342.) Leddy testified that the purpose of BID is widespread and includes promoting economic development; increasing building occupancy and leasing; providing sidewalk sweeping, pressure washing, graffiti removal, and trash removal; providing security guards and foot patrols; and providing media relations and advocacy. To provide these services, the real property owners within the LA Fashion BID boundaries have a special assessment levied on each parcel on a yearly basis. (2 Exh. 7:342.) Leddy testified to the complex, involved procedures for the renewal process and that she was responsible, with Mr. Gonzalez, to oversee that process. (2 Exh. 7:342-.) Urban Place Consulting Group Inc. was utilized in that process, too. (2 Exh. 7:344; 403-410.) Leddy's Declaration identified no other employee of LA Fashion BID as involved in that process with Urban Place Consulting. Urban Place Consulting prepared the Management Plan. (2 Exh. 7:344; 411-544.) As a result of the renewal process, Leddy and Gonzalez had "many pre-decisional communications" with Urban Place Consulting Group Inc. (2 Exh. 7:344.) No other persons were identified by Leddy as having communications with Urban Place Consulting. For every special

benefit provided by the LA Fashion BID, a complicated analysis was required by Leddy, Gonzalez and Urban Place to determine each real property parcel's proportionate share of the cost. (2 Exh. 7:344.) Leddy described how important free communication with Urban Place was required and that every real property owner had their own unique financial condition that would be potentially interrupted and destroyed if that property owner did not perceive the special benefits to be worth the special assessment. (2 Exh. 7:345-346 [¶ 15 and 17] All of this analysis of data with Urban Place culminated in the Management Plan, which is a matter of public record. (2 Exh. 7:345-346.) Further, the business of BID had very little to do with illegal lobbying. (2 Exh. 7:352 [¶ 27].)

H. Leddy also testified regarding the 78 CPRA requests received from Riskin, which resulted in the production of over 5,000 pages of records. (2 Exh. 7:346.) Leddy stated that she has no ability to perform a system-wide search of emails. Every LA Fashion BID employee (4 in the offices and 3 in the field office) would search emails, provide them to Leddy, and Leddy would read every email identified by any LA Fashion BID employee and determine if those documents were responsive and whether exemptions applied. (2 Exh. 7:346.) Leddy testified she has no objection to complying with the CPRA and that when emails are requested under a CPRA and those emails exist, they are produced unless an exemption applies. (2 Exh. 7:347; 350-351.)

I. With regard to Riskin's Request Nos. 1, 2 and 3, Leddy testified that she responded properly and accurately. (2 Exh. 7:347.) Leddy explained that Riskin's May 17, 2017 Request No. 1 actually consisted of several CPRA requests, including: (a) communications between BID and South Park BID from January 1, 2016 through May 15, 2017 and (b) all 2017 emails of the Chairman of the BID Board, Mark Chatoff relating to the operation of BID. (2 Exh. 7:347.) As to Request No. 1, Leddy stated that all records were produced without exemptions. Stated differently, no records were withheld because of a deliberative process privilege. (2 Exh. 7:347.) Leddy further explained that her July 17, 2017 email response that raised the deliberative process exemption was actually an email responding to correspondence regarding Riskin's Request No. 2, not in response to Request No. 1. (2 Exh. 7:347.)

J. Leddy also explained that Riskin's July 7, 2017 Request No. 2 was only a part of multiple CPRA requests by Riskin that also sought emails between Urban Place Consulting and any BID staff/board member. (2 Exh. 7:326.) In a separate CPRA request, Riskin had already sought Leddy's emails with UPC. (2 Exh. 7:348.) Leddy testified that Gonzalez (the only other person having contact with UPC other than Leddy) identified a few emails which Leddy determined were exempt based on the deliberative process privilege. (2 Exh. 7:348.) Leddy so informed Riskin on July 17, 2017. (2 Exh. 7:348.) As a consequence, no records were produced because all records fell within the privilege. (2 Exh. 7:349.)

K. Leddy further explained that Riskin's July 31, 2017 Request No. 3 included seven CPRA requests, including the request seeking all 2017 emails in Linda Becker's possession related to the operation of BID. (2 Exh. 7:349.) Leddy informed Riskin there were no documents responsive to Request No. 3. (2 Exh. 7:349.) Riskin suggested Leddy was lying. When Leddy realized that the Request might also include Leddy's emails to Becker, Leddy invoked the deliberative process in an abundance of caution. However, upon further review, Leddy confirmed no documents existed that were responsive to Request No. 3. (2 Exh. 7:350.)

L. Leddy expressed her opinion that making public the pre-decisional emails to and from Gonzalez regarding work, calculations and analysis would detrimentally impact the renewal process by disclosing information that would potentially create conflicts between real property owners regarding special assessment methodologies still in the formative stages and would reduce the ability to make policy decisions without the knowledge and experience of the consulting services of Urban Place Consulting. (2 Exh. 7:350.)

M. Exhibits 9 and 10 were brought to the court for the hearing on the Motion and for in camera review. (2 Exh. 7:331.)

N. Based on the foregoing evidence, and relying upon California Streets & Highways code, sections 36606 and 36612, BID argued that BIDs are private entity owners' associations, not public entities and, as a matter of law, a BID's

volunteer Board Members are not "public officials." (3 Exh. 9:710-711.) Therefore, Board Members' emails on their private computers are not public records and BID could not be compelled to disclose those emails. (3 Exh. 9:711-712.)

N. In addition, BID argued that private emails of nonemployee board members are not within the actual or constructive possession of the BID because BID did not have ownership, control or authority to access the data within the private emails of the volunteer Board Members' emails. (3 Exh. 9:712-714.)

O. BID argued that neither the CPRA nor the BID Agreement has a public records retention requirement. (3 Exh. 9:714-715.) BID also argued that production of the Board Members' private emails would result in an invasion of privacy and security. (3 Exh. 9:715.)

P. BID argued that Petitioner Riskin failed to meet his burden to establish that BID failed to disclose public records in its possession in response to Request Nos. 1, 2 and 3. (3 Exh. 9:716-718.) As to the May 17, 2017 Request No. 1, all documents were produced that existed and no LA Fashion BID Board Members' emails existed. (3 Exh. 9:716, 717-718.) As to the July 31, 2017 Request No. 3, Riskin was advised no records were responsive because Becker had no emails in existence at the time of the Request that were related to the operation of LA Fashion BID. (3 Exh. 9:716, 718.) Also, the deliberative process privilege applied to the Request No. 2 seeking emails between BID and the UPC. (3 Exh. 9:719-722.) As the evidence also

established, Exhibit 9 was a private email submitted for in camera review and Exhibit 10 was related to pre-decisional policy matters regarding LA Fashion BID's renewal process also submitted for in camera review. (3 Exh. 9:718, 721.) The interest in preserving Gonzalez's pre-decision email communications with UPC outweighed the public benefit in disclosure, particularly because no illegal lobbying was involved. (3 Exh. 9:722.)

8. Riskin filed a Reply to BID's Opposition to the Petitioner for Writ. (3 Exh. 11:727-738.)

A. The Reply included Riskin's Objections to certain items of evidence offered by LA Fashion BID. (3 Exh. 10:724-726.) Riskin also responded to BID's Objections to Riskin's evidence. (3 Exh. 12:739-760.)

B. Riskin's Reply was supported by two Cisneros Reply Declarations. (3 Exh. 13:761-762.) Both Cisneros' Reply Declarations explained the manner in which the Riskin verification had been misfiled and that Petitioner signed another declaration in a different matter where Cisneros was represented. (3 Exh. 13:761-762; 782-786.)

C. Riskin's Declaration was also included with the Reply. The Riskin Declaration further explained the manner in which formatting changes occurred and attached the Verification that had been split over two pages. (3 Exh. 14:764-781.)

D. Riskin's Reply argued that the Supreme Court decision in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608 held that "private" email accounts of agency officers are "public

records. (3 Exh. 11:730.) Riskin argued the *City of San Jose* Decision did not rely on the term "public official" in its holding and, therefore, LA Fashion BID Board Member emails are public records and in its "actual possession." (3 Exh. 11:731-733.) As to Request Nos. 1, 2 and 3, Riskin argued that LA Fashion BID unlawfully denied Petitioner Riskin access to Board Emails "by failing to search." (3 Exh. 11:734.) Riskin considered the evidence that documents did not exist to lack credibility. (3 Exh. 11:734-735.) An inadequate search was conducted, according to Riskin, because BID failed to communicate the scope of the request to Gonzalez and communicated only limited information. (3 Exh. 11:735-736.) Lastly, Riskin argued that BID did not meet its burden to establish the deliberative process privilege. (3 Exh. 11:737.)

9. On June 26, 2019, Respondent Court conducted an extensive hearing on the Petition for Writ of Mandate and the matter was taken under submission. (3 Exh. 17:790.)

A. Respondent court started his remarks by indicating that the granting of the Petition as to Request No. 2 "is a bit of a close call" and admitting that he was denying the Petition "in all other requests." (3 Exh. 28:988.) Regarding the Request No. 2 emails with UPC, Respondent Court emphasized that there were insufficient facts for him to understand the search process and to determine whether LA Fashion BID performed a search of all staff emails. (3 Exh. 28:91027-1028.)

B. Petitioner Riskin argued predominantly regarding Request Nos. 1 and 3 that BID took a strong position

that the emails are not subject to the CPRA and, therefore, did not conduct a contemporaneous search. (3 Exh. 28:1001.) Counsel for Riskin also argued that LA Fashion BID stated there are no records but "they didn't state how they came about that conclusion" and, therefore, another search should be directed "just to be sure." (3 Exh. 28:1005.) Counsel repeated that Leddy should provide evidence showing that board members were asked to search their emails. (3 Exh. 28:1009-1010.)

C. LA Fashion BID argued that Riskin has the burden to show that records exist. (3 Exh. 28:1019.) Regarding Riskin's request for declaratory relief, notice was insufficient because it was unclear what relief was being sought. Regarding Request Nos. 1 and 3, LA Fashion BID argued it had taken the position in response to the Petition that it had no obligation to produce records of volunteer board member emails, but LA Fashion BID never took that position with Riskin and, in fact, responded that no documents existed. (3 Exh. 28:1020-1023.) Regarding the Request No. 2 UPC emails, LA Fashion BID properly asserted the deliberative process privilege. LA Fashion BID's counsel brought to Respondent Court's attention that a previous CPRA request sought Leddy's emails, which had been produced. (3 Exh. 28:1025, 1026.) Significantly, counsel clarified that in working with UPC during the BID renewal process, Leddy worked with Gonzalez – only Gonzalez – on the renewal process, which would explain the reasonableness of the search (i.e., she went where she would expect to find requested documents). (3

Exh. 28:1026-1028, 1038-1039.) Counsel offered to submit additional evidence in that regard. (3 Exh. 28:1028-1029.)

C. The matter was taken under submission by respondent court. (3 Exh. 28:987-1043.)

10. While the matter was under submission, and because a question arose at the hearing whether LA Fashion BID searched other staff member emails for communications with the UPC, LA Fashion BID sough an *ex parte* order on July 2, 2019, to allow augmentation of the record with the Declarations of Carol Humiston and Rena Leddy. (3 Exh. 18:791-802.) The Leddy Declaration made clear that the only persons who communicated with UPC during the renewal process were Jose Gonzalez and Rena Leddy. (3 Exh. 18:798.) Leddy also explained that she consistently distributes all CPRA requests to her staff to search for responsive documents. (3 Exh. 18:798.)

11. Also on July 2, 2019, Petitioner Riskin filed an ex parte application for an order that Rena Leddy provide sworn testimony as a witness, under Evidence Code, section 775. (3 Exh. 19:805-806.) Riskin sought the opportunity to obtain Leddy's sworn testimony regarding whether she contacted BID Board Members to conduct a search for records in response to Riskin's CPRA requests. (3 Exh. 19:803.)

12. Respondent BID opposed Riskin's Ex Parte seeking to elicit deposition testimony from Leddy. (3 Exh. 20:811-942.) BID's Opposition was based on a prior mutual agreement to withdraw all pending discovery and to waive discovery on the merits. (3 Exh. 20:812, 815-816, 818, 927-939.) The pending

discovery was extensive and included BID's Notice of Deposition of Riskin. (3 Exh. 20:820-860.) Further, BID argued that communications between Leddy and the Board Members about the CPRA requests were not subject to discovery because of the deliberative process privilege. (3 Exh. 20:813, 816.) Therefore, testimony from Leddy on that subject would have been improper. (3 Exh. 20:816.)

13. On July 2, 2019, a hearing was conducted on both Ex Parte Applications. Respondent court denied both applications. (3 Exh. 21:942.)

14. On July 16, 2019, Respondent Court denied the Petition in part and granted the Petition in part. (3 Exh. 23:945-956.) Respondent court directed Petitioner Riskin to prepare an order and judgment consistent with the ruling. (3 Exh. 23:956.)

15. Riskin submitted both a Proposed Judgment and a Peremptory Writ of Mandate. (3 Exh. 24:957-975; 3 Exh. 25:976-978.)

16. BID objected to the Peremptory Writ of Mandate because the Writ: (1) failed to reflect that the Petition had been denied in significant part; (2) demanded records to be produced "forthwith;" and (3) required disclosure of "the steps taken to comply with this writ." (3 Exh. 26:979-981.)

17. BID also similarly objected to the Proposed Judgment on the same grounds as reflected in the objections to the Peremptory Writ of Mandate and also because Petitioner had been selective on the matters "ordered, adjudged and decreed." (3 Exh. 27:984-985.)

18. On August 15, 2019, Judgment was entered. (3 Exh. 29:1046-1061.) Notice of Entry of Judgment was served by mail on August 20, 2019. (3 Exh. 29:1044-1045.)

A. As to CPRA Request No. 1 (seeking emails between BID staff or Board and South Park BID and emails from 2017 in the possession of Mark Chatoff relating to the operation of the BID), respondent court determined: (1) no such documents exist; (2) BID complied with its obligation under the CPRA; and, (3) the Petition for Writ of Mandate was denied. (3 Exh. 29:1055-1057.)

B. As to Riskin's CPRA Request No. 2 (seeking all emails between anyone at Urban Place Consulting and any BID staff other than Leddy), respondent court concluded that BID withheld documents based on the deliberative process privilege (3 Exh. 29:1057.) Respondent court examined Exhibit 10 *in camera* and found "certain portions of the emails were" protected by the deliberative process privilege and other portions were not. (3 Exh. 29:1058-1059.) Of the five-page, two email strings, Respondent court concluded that there was insufficient evidence that BID undertook an adequate search by seeking information from only Gonzalez. (3 Exh. 29:1060.) Respondent court identified those portions of the emails that could be redacted and those portions that had to be produced. The Petition was granted as to Request No. 2 as indicated. LA Fashion BID was ordered to file a return to the writ within sixty (60) days after notice of entry of the writ. (3 Exh. 29:1047)

C. Regarding CPRA Request No. 3 (seeking copies of all 2017 emails in the possession of Linda Becker), respondent court determined: (1) Becker was credible; (2) no responsive emails existed; (3) Exhibit 9 was not responsive because it did not relate to the operation of LA Fashion BID; and, (4) The Petition for Writ of Mandate was denied.

D. Respondent court denied Riskin's request for declaratory relief.

5. Basis Of Relief

19. Writ review is proper because the Judgment Granting In Part the Petition for Writ of Mandate is erroneous, contrary to the law and has the practical effect of placing Petitioner in contempt of court if it fails to comply with the improper disclosure of protected information. Writ review is proper where, as here, respondent court's order requires the disclosure of privileged communications.

20. Without writ review, the deliberative process involved with LA Fashion BID and its renewal will be curtailed and its relationship with its association members and its consultant will be in jeopardy due to the loss of the ability to communicate with frankness and candor. The uncontroverted evidence established that many of the real property owners who pay the special assessments at LA Fashion BID are not pleased with the amount assessed and disclosure of the predecisional communications regarding those special assessments would have an adverse effect on the renewal of LA Fashion BID, weighing against disclosure. The uncontroverted evidence also established

that the need for public disclosure – Riskin's arguments to the effect that LA Fashion BID participates in illegal lobbying regarding homelessness – was not a subject discussed in the emails responsive to Request No. 2. In other words, the only reasonable inference of the evidence is that the weight tipped heavily against disclosure of the subject emails and Respondent Court erred by ordering disclosure.

21. Writ review is also proper to address issues of first impression where the opportunity exists to generate guidelines benefitting a potential multitude of cases. This is an issue of great importance because of the nature of this case deliberative process. The judiciary and the bar, like respondent court, would benefit from an analysis of the manner in which privileged communications are "inextricably intertwined" with non-privileged information. Very few California appellate decisions have been located that do anything other than mention the existence of the doctrine, particularly in federal court. This Court now has the opportunity to resolve this important question in the context of a court ruling where Respondent Court went so far as to carve out 6 words from a 20 word sentence for redaction rather than making a logical determination that the information contained within the 14 words was "inextricably intertwined" with related privileged information.

22. Absent extraordinary relief, Petitioner LA Fashion BID will be forced to disclose protected deliberative process information. If this Court permits Respondent Court's order to stand, LA Fashion BID will suffer irreparable harm from being

forced to comply with an erroneous order and the "bell" cannot ever be "unrung." Mandate is an appropriate remedy to prevent improper disclosure. (See, *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1012.)

6. Absence of Other Remedies

23. LA Fashion BID has no immediate right to appeal from Respondent Court's order and the only permissible avenue for review is a petition for writ of mandate. (Gov. Code, § 6259, subd. (c).) If the issues presented above are not resolved now, LA Fashion BID will be forced to disclose privileged, non-discoverable information or face contempt for disobeying a court order. Once the privileged information is disclosed, no effective, adequate remedy will be available because no appeal exists and LA Fashion BID cannot "un-disclose" that which has already been disclosed absent writ relief.

7. The Need for An Immediate Stay.

24. Respondent Court's Judgment directs production of records and the conduct of another search for records and the filing of a return to the writ no later than sixty (60) days after the notice of entry of the writ. (3 Exh. 29:1047.) The Notice of Entry was served by mail on August 20, 2019. Therefore, without an immediate stay, LA Fashion BID will be required to produce protected records or be in violation of the court order on or about October 21, 2019.

8. Prayer.

WHEREFORE, Petitioner prays that this Court:

1. Issue a peremptory writ of mandate in the first instance directing respondent court to vacate the portion of its August 15, 2019 Judgment Granting in Part the Petition for Writ Of Mandate, directing LA Fashion BID to undertake a reasonable search for documents responsive to Request No. 2 and to produce records discovered as well as Exhibit 10 in redacted form and to enter a new and different order denying the Petition For Writ Of Mandate in its entirety.

2. Alternatively, issue an alternative writ directing respondent court to vacate the portion of its August 15, 2019 Judgment Granting in Part the Petition for Writ Of Mandate, directing LA Fashion BID to undertake a reasonable search for documents responsive to Request No. 2 and to produce records discovered as well as Exhibit 10 in redacted form and to enter a new and different order denying Riskin's Petition for Writ of Mandate in its entirety, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ directing respondent court to vacate the portion of its August 15, 2019 Judgment Granting in Part the Petition for Writ Of Mandate, directing LA Fashion BID to undertake a reasonable search for documents responsive to Request No. 2 and to produce records discovered as well as Exhibit 10 in redacted form and to enter a new and different order denying Riskin's Petition for Writ of Mandate in its entirety.

3. Stay respondent court's August 15, 2019 Judgment Granting in Part the Petition for Writ Of Mandate pending the outcome of this Petition.

4. Award Petitioners costs, attorneys' fees, and such other relief as may be deemed just and proper.

DATED: September 16, 2019 Bradley & Gmelich LLP

By: _____

Barry A. Bradley
Carol A. Humiston
Dawn Cushman
Attorneys for Respondent and
Petitioner **LOS ANGELES PROPERTY OWNERS ASSOCIATION**

Verification

I, Carol A. Humiston, declare:

1. I am an attorney with Bradley & Gmelich LLP, the attorneys of record for Respondent Los Angeles Property Owners Association in the action entitled Adam Riskin v. Downtown Los Angeles Property Owners Association, Los Angeles County Superior Court Case No. BS174792.

2. I am one of the attorneys responsible for the day-to-day handling of this matter. I drafted the Opposition to Petitioner's Motion For Writ of Mandate. I attended the hearings the motion and various ex parte applications.

3. Because of my familiarity with the relevant facts pertaining to the court filings and proceedings, I, rather than Petitioner Los Angeles Property Owners Association, or any officer thereof, verify this Petition.

4. I have read the foregoing Petition for Writ of Mandate or Other Appropriate Relief and know its contents. I

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have personal knowledge of the facts alleged in the petition and the truth of those facts.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on September 16, 2019, at Glendale, California.

Carol A. Humiston

LEGAL ARGUMENT

1. Extraordinary Writ Relief Is Warranted Because There Is No Right To Appeal Pursuant To Government Code, Section 6259.

A. An Erroneous Order For The Production Of Public Records Can Only Be Reviewed By Petition For Writ Of Mandate.

Government Code, section 6259, mandates that a party has no right appeal from the erroneous court order directing disclosure of public records and the only right to appellate review is by a petition for writ of mandate. (Gov. Code, § 6259, subd. (c); *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1141.) In that regard, section 6259 states:

> ". . . [A]n order of the court, either directing disclosure by a public official or supporting the decision of the public official refusing disclosure, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (*Ibid.*)

There is no right of appeal. Thus, none of the traditional justifications governing this Court's discretionary decision for the granting of a writ petition are applicable here, where a party is statutorily limited to appellate review through a petition for writ of mandate. In fact, the design of Government Code, section 6259, was to allow for an expedited procedure in order to obtain independent appellate review on the merits with speed and deliberation, "as if this case were on appeal." (*State Board of Equalization v. Superior Court* (1992) 10 Cal.App.4th 1177,

1184–1185; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1334, fn. 6, 1336 [*Times Mirror*].)

Furthermore, in the context of the protections afforded by the attorney-client privilege, the California Supreme Court determined that the need for writ review is "obvious" when an order overrides a privilege because an appeal cannot provide an adequate remedy. (*Roberts v. Superior Court* (1973) 3 Cal.3d 330, 336.) Compliance with a court order to produce privileged documents will result in the improper disclosure of the privileged information absent writ review. (*Ibid.*) The same is true, here, where the Respondent Court's order intrudes on the deliberative process privilege.

Therefore, this Court should issue an extraordinary writ, as requested in the Prayer.

B. Regardless Of Statutory Mandate, Important Questions Of Law Compel The Issuance Of A Writ.

Writ review becomes warranted in instances involving important questions of law, where no adequate remedy at law exists and the petitioner will suffer irreparable harm in the absence of appellate review. (See, *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274.) Writ review is also appropriate where the petition presents an issue of first impression, likely to affect many cases. (See, *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152; see also, *Browne v. Superior Court* (1979) 98 Cal.App.3d 610, 613; *Stermer v. Superior Court* (1993) 20 Cal.App.4th 777, 779-780.)

This is one of those cases.

Relatively few judicial decisions in California to anything other than mention the "inextricably intertwined" exemption for documents protected by the deliberative process privilege. (See, *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 453.) Of those cases, the appellate courts expressly recognize that a public agency does not violate the CPRA by withholding documents under the deliberative process privilege that are inextricably intertwined with nonexempt information. (*Ibid.*)

No published California decision found by Petitioner LA Fashion BID directly addresses or performs any significant or meaningful legal analysis of that concept particularly in conjunction with Government Code, section 6253, which requires production of portions of documents "reasonably segregable" from those that are exempted. (See, *Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1274; see also *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 292 [discussing "reasonably segregable" but not addressing either the deliberative process privilege or the concept of "inextricably intertwined" information]; see also, *citizens for A Better Environment v. Department of Food* and Agriculture (1985) 171 Cal.App.3d 704 [discussing "inextricably intertwined" but not in the context of the deliberative process privilege].)

Federal court cases recognize and continue to address the fact that the Freedom Of Information Act was substantially altered to its present form to emphasize the need to assure that nonexempt material that is "inextricably intertwined" with

deliberative process materials would also be exempt from disclosure. (See, *Weber Aircraft Corp., a Div. of Walter Kidde & Co. v. United States* (9th Cir. 1982) 688 F.2d 638, 643, fn. 7, rev'd on other grounds, *United States v. Weber Aircraft Corp.* (1984) 465 U.S. 792, 104 S. Ct. 1488, 79 L. Ed. 2d 814.) Federal decisions hold that documents containing "purely factual" information continue to be exempt from disclosure and public scrutiny where the information is either "related" to the policies being formulated or "inextricably intertwined with the deliberative communications. (See, *Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 27 [and the federal cases cited therein]; *National Wildlife Federation v. U.S. Forest Service* (9th Cir. 1988) 861 F.2d 1114, 1119.)

The application of the "inextricably intertwined" concept needs to be addressed and analyzed by this Court, particularly where Respondent Court exhibited such a deliberate disregard for the privilege that Judge Beckloff applied the equivalent of an X-Acto knife to not only redact sentences from paragraphs involving the deliberative process but also to carve out 6 words from a 20-word deliberative process sentence. How is the parsing of 6 words from a sentence constitute matter that is "reasonably segregable" from protected information let alone not "inextricably intertwined" with that information? How is a salutation no inextricably intertwined with the entire content of the protected email? Writ review would provide a benefit to the judiciary, the bar and public agencies on the tension between document

production and the deliberative process privilege "inextricably intertwined" with matters "related" thereto.

Writ review should be granted here.

2. Extraordinary Relief Should Be Granted Because Respondent Court Erred In Ordering Disclosure Of Records Admittedly Protected Under The Deliberative Process Privilege.

A. The Standard Of Review.

More than one standard of review may apply from an order under the California Public Records Act. The trial court's ruling on the interpretation of and application of the CPRA is reviewed by the appellate court *de novo*. (*Times Mirror*, 53 Cal.3d at p. 1336; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 66 ["*ACLU of Northern California*"].) The trial court's express or implied factual determinations are reviewed under the substantial evidence standard. (*Ibid.*; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 650-651.)

Where an exemption from disclosure applies, the appellate court undertakes a *de novo* review of the weighing process to determine whether the public interest served by withholding the records is outweighed by the public interest served by disclosure. (*Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1253–1254; *ACLU of Northern California, supra*, 202 Cal.App.4th at p. 66, 67.)

The person seeking disclosure of public records bears the burden to establish that public records exist and are in the possession of the agency. (*Anderson-Barker v. Superior Court* (2019) 31 Cal.App.5th 528, 538.) No duty to disclose the records

exists until the party seeking disclosure establishes those elements. (*Id.* at p. 539.) Thereafter, the public agency bears the burden to demonstrate that an exemption applies. (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321.)

B. The California Public Records Act.

In California, the public's ability to access public records is governed by the California Public Records Act ("CPRA"), Government Code, section 6250 et seq. The CPRA is patterned upon, but not identical to, the federal Freedom of Information Act, Title 5 U.S.C, section 552. (*Wilson v. Superior Court, supra,* 51 Cal.App.4th at p. 1141.)

The CPRA represents the Legislature's expression of public policy generally favoring disclosure of public records. (Gov. Code, §§ 6250, 6253; .) Yet, the right to obtain public records is not absolute. (*Pasadena Police officers Assn. v. Superior Court* (2015) 240 Cal.App.4th 268, 284.) The Judiciary and the Legislature limit the disclosure of public records with well-established statutory and common law privileges and exemptions. (Gov. Code, § 6254.)

One of the common law exemptions that justifies the nondisclosure of public records is the "deliberative process privilege," also known as the "executive privilege." (See, Gov. Code, §§ 6254 and 6255; *Times Mirror Co. v. Superior Court, supra,* 53 Cal.3d at p. 1342.)

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C. The Deliberative Process Privilege.

The deliberative process privilege and exemption is prevalent under federal law (i.e., FOIA) and is the equivalent of the common law "executive privilege." (*Times Mirror, supra*, 53 Cal.3d at p. 1340.) It is also recognized in California. (*Ibid.* at p. 1339-1340, fn. 10; see also, Gov. Code, § 6255.) Succinctly stated, the deliberative process privilege provides a qualified privilege to prevent disclosure regarding "'not only the mental processes by which a given decision was reached but the substance of conversations, discussions, debates, deliberations and like materials affecting advice, opinions and recommendations by which government policy is processed and formulated.'" (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305, quoting, *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540.)

The deliberative process privilege is based on the fundamental policy that the decision-making process needs to be protected to allow "frank discussion" during the formulation of policy that would otherwise be inhibited and hampered if the process is disclosed to public scrutiny. (*Times Mirror, supra*, AT P. 1340)

> "To prevent injury to the quality of executive decisions, the courts have been particularly vigilant to protect communications to the decisionmaker before the decision is made." (*Id.* at p. 1341.)

The function of the deliberative process privilege is to protect from public disclosure the "process" of deliberation taken

by the agency, not just the deliberative material. (*Ibid.*) Thus, factual, investigative matters normally subject to disclosure will also be protected from disclosure where the revelation of those matters has the tendency to expose the deliberative process. (*Ibid.*)

> "The key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' [Citation.] Even if the content of a document is purely factual, it is nonetheless exempt from public scrutiny if it is 'actually ... related to the process by which policies are formulated' [Citation] or 'inextricably intertwined' with 'policy-making processes.'" (*Id.* at p. 1342.)

The trial court commits reversible error by commanding disclosure of matters protected by the deliberative process privilege. (*Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 17.)

In the *Times Mirror* Case, the California Supreme Court addressed the CPRA in the context of a public records request seeking the Governor's appointment schedules, calendars and notebooks, including the identity of the persons with whom the Governor met. (*Id.* at p. 1329, 1343.) The California Supreme Court's analysis of the deliberative process privilege recognized that information disclosing the identity of the persons consulted "is the functional equivalent of revealing the substance or

direction of the Governor's judgment and mental process – a patent intrusion in the deliberative process. (*Id.* at p. 1342.) Similarly, the *Times Mirror* Court emphasized the need to maintain confidentiality to prevent the sharp curtailment of "the flow of information. (*Id.* at 1343.) Disclosure of the Governor's calendar information about private meetings with unfavorable groups would likely chill and inhibit lawmakers and others from seeking meetings altogether. (*Id.* at p. 1344.)

The *Times Mirror* Court held that that all of the information sought was protected. The *Times Mirror* Court then independently engaged in the weighing process and determined that the public interest in nondisclosure outweighed the interest in disclosure. (*Id.* at p. 1345.)

The deliberative process privilege applies to "predecisional communications" – the communications where the public official is allowed to test ideas and debate issues. (*Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 27.)

The *Times Mirror* Decision was followed in both the *Labor & Workforce* Case and in *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 170. The *California First Amendment Coalition* Decision recognized that the privilege has its basis in three policies: (1) to protect debate and candid consideration of alternatives to improve the quality of agency decisions; (2) to protect the public from confusion "from premature exposure to discussions occurring before the policies affecting it had actually been settled upon" and (3) protecting the

integrity of the decision-making process so that the public judges its government officials by their actual decisions rather than by the matters they considered before deciding." (*Id.* at p. 170.) Without the maintenance of confidentiality, the efficacy of decision-making and the deliberative process if hindered. (*Id.* at p. 172.) The *California First Amendment Coalition* Court found it difficult to imagine how the disclosure of pre-decision information exchanged in confidence during the process of making an agency decision would advance any cause for disclosure. (*Id.* at p. 174.)

Similarly, the *Labor & Workforce* Decision reaffirmed the holding in *Times Mirror* to the effect that not only the disclosure of the substance of an agency's confidential communications with third parties "would run afoul of the deliberative process privilege, so too disclosure of the identities of the persons with whom the Agency communicated implicates the same concern." (*Id.* at p. 30.)

D. The Trial Court Erred By Ordering Production Of Redacted Records Because The Protected Information Was Inextricably Intertwined With Other Information.

Government Code, section 6253, subdivision (a), has been interpreted to require agencies to use the equivalent of a surgical scalpel to separate those portions of a record that are subject to disclosure from matters that are protected by the privilege. However, public agencies are not required to attempt selective disclosure of records that are not "reasonably segregable." (Gov. Code, § 6253, subd. (a); *Los Angeles County Bd. of Supervisors v Superior Court, supra*, 2 Cal.5th at 292.

Here, the Fashion District BID sought protection for two email strings exchanged between BID's Finance Manager and its consultant, Urban Place Consulting, involving the special assessment methodology utilized by the Executive Director to make recommendations for the renewal of the BID and the property assessments made against the association members. Executive Director Leddy, with Finance Manager Gonzalez, made recommendations to the Board regarding those assessments. (1 Exh. 7:351-345.) During the pre-decision phase, emails were exchanged with UPC that contained mental thoughts and ideas, discussed the methodology used, and identified documents examined in the process of determining the special assessments. The evidence established that it was Leddy and Gonzalez, only, who communicated with UPC during the renewal process. (2 Exh. 7:344 [¶ 14].)

Respondent Court determined that the subject emails, submitted *in camera*, were protected by the deliberative process privilege yet ordered production of redacted emails and ordered an additional search for records responsive to Request No. 2. Writ review is necessary because Respondent Court's order is erroneous in several respects.

Writ review is warranted where a trial court's order improperly runs the risk of infringing a privilege. (See, *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1012 [citing *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336].)

Further, Respondent Court parsed the emails sentence-by-sentence, paragraph by paragraph, ordering that the email

exchange be produced in a redacted form. No regard was made for how those sentences, paragraphs and words were "inextricably intertwined" with the context of the subject emails – namely, that all the information was "related to" the deliberative process, precluding all disclosure.

The erroneous nature of Respondent Court's determination is exemplified by the order directing that 6 words out of a 20-word sentence be withheld (redacted) as privileged while the remaining 14 words are ordered disclosed.

In doing so, Respondent Court erroneously failed to recognize that an agency's has no obligation to produce any privileged information, particularly where the nonexempt materials are "inextricably intertwined" with exempt materials. "Inextricably intertwined" inherently includes a single sentence of 20 words.

Also, the Respondent Court failed to engage in the "weighing process" to determine whether the need for nondisclosure outweighed the need for public disclosure. (Gov. Code, § 3255.) The uncontroverted evidence established that many of the real property owners who pay the special assessments are not pleased with the amount assessed against them and disclosure of the predecisional communications regarding those special assessments would have the effect of creating a conflict over the various potential special assessment methodologies, weighing against disclosure. (2 Exh. 7:350.)

No substantial evidence existed to support Riskin's claim that LA Fashion BID engages in participation in illegal lobbying

regarding homelessness. The uncontroverted evidence established that the subject emails were unrelated to any alleged lobbying. (2 Exh. 7:326.)

As a consequence, Respondent Court improperly mandated the disclosure of information revealing the deliberative process undertaken by the Los Angeles Fashion District BID while working with a consultant, UPS, regarding the BID renewal process.

This case presents issues of major importance to the judiciary and the legal profession because few California judicial decisions mention the term "inextricably intertwined" in the context of a CPRA request, let alone analyze that term in the context of emails indisputably protected by the deliberative process privilege. Furthermore, there is a dearth of authority regarding the "reasonableness" of the scope of a search under the CPRA.

E. The Trial Court Erred In Requiring An Additional Record Search.

The CPRA does not mandate a public agency to search for records in any particular fashion. Rather, agencies need only make "reasonable efforts" to locate documents. (*Cal. First, supra,* 67 Cal.App.4th at p. 166, *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 627.) "Reasonable efforts" are not the equivalent of a requirement to undertake extraordinarily extensive or intrusive searches. (*Ibid.*) Rather, the agency is required to undertake a search that is "reasonably calculated to locate responsive documents." (*Id.* at p. 627; see also, *ACLU of N. California, supra,* 202 Cal.App.4th at p. 85; see also, *Community*

Youth Athletic Center v. City of National City (2013) 220 Cal. App. 4th 1385, 1418; see also, *Hamdan v. U.S. Department of Justice* (9th Cir. 2015) 797 F.3d 759, 770 [under Freedom of Information Act ("FOIA"].)

Requests for public records should be directed first by the agency "to the employees in question" who are the custodians of the records and then the agency is entitled to rely on the employees to search the files for responsive material. (*City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 627-628.)

Respondent Court's factual determination that LA Fashion BID failed to undertake "an adequate and reasonable search for documents responsive to this request" is unsupported by the record.

The undisputed facts that were before the Respondent Court at the time of the hearing established that a "reasonable search" was performed because: (1) Respondent Court expressly found that with regard to Request No. 1 and 3, LA Fashion BID followed its usual and customary practice of asking every BID employee (seven employees) to search for records in response to any CPRA request (3 Exh. 29: 1054-1055, fn. 3); (2) Respondent Court found Leddy's sworn statement of no documents found, in context, to be credible (3 Exh. 29: 1056); (3) Respondent Court found no Board Member had documents responsive to Request No. 2 and no Board Member destroyed responsive documents (3 Exh. 29: 1056, fn. 6); (4) Executive Director Leddy's emails were not part of Request No. 2 (3 Exh. 29:1052, 1060); (5) Finance Manager Gonzalez was the only employee out of the seven LA

Fashion BID employees who found and identified documents responsive to Riskin's Request No. 2, which were then reviewed and determined by Leddy to be exempt under the deliberative process privilege (3 Exh. 29:1058).

Thus, consistent with LA Fashion BID's obligation, the evidence and all reasonable inferences established that Leddy asked all seven employees for records responsive to Request No. 2, as she had done with the others. There was no one else to ask. There was no other search that could have been or should have been performed. As a matter of law, the search performed was reasonable and Respondent Court abused its discretion concluding otherwise. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 [where the undisputed facts establish that the trial court abused its discretion in isuing an order, a writ of mandamus is appropriate to remedy the error].)

In addition, Respondent Court also abused its discretion by refusing to augment the record with evidence offered by LA Fashion BID both at the hearing on the Petition and, subsequently, by ex parte application. (3 Exh. 18:803; 3 Exh. 21:942; and 3 Exh. 29:1060.) BID offered to and did provide a supplemental Leddy Declaration conclusively establishing that the only BID employees who communicated with UPC during the renewal process were LA Fashion BID's Executive Director Leddy and the Finance Manager Gonzalez. (3 Exh. 18:798.) Leddy also provided supplemental testimony, consistent with Respondent Court's findings, that she reads the CPRA requests and askes for searches "at every staff meeting." (3 Exh. 18:798.) Again, the

only reasonable inference is that all staff members were asked for records responsive to Request No. 2 and no staff member other than Gonzalez advised Leddy of any records responsive to Request No. 2. Respondent Court's determination that no adequate search was performed is contrary to the evidence and all reasonable inferences therefrom.

Respondent Court's denial of the ex parte Application to allow the Supplemental Leddy Declaration was also error. Generally, the trial court's rulings on the admissibility of evidence are determined under the abuse of discretion standard of review. (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.* (2006)139 Cal.App.4th 1356, 1414.) The trial court has the inherent power to control the order of proof and they have broad discretion for deciding whether to "reopen" a case after the announcement of a tentative decision. (See, Code Civ. Proc., § 128, subd. (a)(3); *Horning v. Shilberg* (2005) 191 Cal.App.3d 1035, 1052; *In re Fama's Estate* (1952) 112 Cal.App.2d 309, 313 [it is an abuse of discretion to deny leave to reopen the case for evidence where the evidence is material on a key issue and a satisfactory explanation is provided for not offering it earlier].)

Here, it was an abuse of discretion for Respondent Court to deny the Ex Parte Application. Counsel for LA Fashion BID indicated that the lack of information was purely a drafting mistake and made an offer of proof that Leddy would testify that only Leddy and Gonzalez communicated with UPC. (3 Exh. 28:1028-1029.) Any due process concern by Respondent Court

could have been cured by continuing the matter and allowing a response by Riskin.

Consequently, yet another error by Respondent Court is demonstrated, magnifying the need for writ review. Respondent court erred in determining that an additional search was mandated with regard to Request No. 2.

3. Conclusion.

For these reasons, a writ of mandate or other appropriate relief should issue requiring Respondent Court to vacate the portion of its August 15, 2019 Judgment Granting in Part the Petition for Writ Of Mandate, directing LA Fashion BID to undertake a reasonable search for documents responsive to Request No. 2 and to produce records discovered as well as Exhibit 10 in redacted form and to enter a new and different order denying Riskin's Petition for Writ of Mandate in its entirety.

Respectfully submitted,

DATED: September 16, 2019 Bradley & Gmelich LLP

By: _____

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204, subdivision (c)(1), I certify that this Petition for Writ of Prohibition, Mandate Or Other Appropriate Relief is proportionally spaced, has a typeface of 13 points, and contains 12593 words, not including the caption page, the certificate of interested parties, the tables of contents and authorities, according to Microsoft Office Word 2016.

DATED: September 16, 2019

Bradley & Gmelich LLP

By: _____

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Attorneys for Respondent and Petitioner **LOS ANGELES PROPERTY OWNERS ASSOCIATION**

PROOF OF SERVICE

Adrian Riskin vs. Downtown Los Angeles Property Owners Association

Case No. BS174792

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Los Angeles, State of California. My business address is 700 North Brand Boulevard, 10th Floor, Glendale, CA 91203-1202.

On September 16, 2019, I served true copies of the following document(s) described as **PETITION FOR WRIT OF MANDATE, PROHIBITION** on the interested parties in this action as follows:

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BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 16, 2019, at Glendale, California.

Deborah Camara